

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | MB Docket No. 14-82 |
| |) | |
| PATRICK SULLIVAN |) | FRN 0003749041, 0006119796, |
| (Assignor) |) | 0006149843, 0017196064 |
| |) | |
| and |) | Facility ID No. 146162 |
| |) | |
| LAKE BROADCASTING, INC. |) | File No. BALFT-20120523ABY |
| (Assignee) |) | |
| |) | |
| Application for Consent to Assignment of |) | |
| License of FM Translator Station W238CE, |) | |
| Montgomery, Alabama |) | |

To: Marlene H. Dortch, Secretary
Attn: Chief Administrative Law Judge Richard L. Sippel

ENFORCEMENT BUREAU'S OPPOSITION TO LAKE S MOTION IN LIMINE

1. On April 21, 2017, Lake Broadcasting, Inc. (Lake) filed a motion in limine to disqualify the Enforcement Bureau's (Bureau) witness, Ms. Tamara Gremminger, and exclude her testimony, on the basis that (i) she lacks the credentials to qualify as an expert in sex offender risk assessment and (ii) she bases her opinions on what Lake alleges to be inadmissible hearsay evidence.¹ Lake also moves to disqualify Ms. Gremminger by questioning her credibility – which goes to the weight of any evidence she would offer and not to her

¹ See Lake Broadcasting, Inc.'s Motion in Limine to Disqualify Tamara Gremminger as an Expert Witness and Reject Her Direct Case Testimony, filed Apr. 21, 2017 (Motion). Lake has previously tried – and failed – to disqualify Ms. Gremminger on similar grounds. See, e.g., Lake Broadcasting, Inc.'s Motion to Reject Exhibits, Halt Depositions, and Require a New Evaluation of Michael Rice or Grant Summary Decision, filed Apr. 14, 2016 at ¶¶ 6-7; Lake Broadcasting, Inc.'s Opposition to Enforcement Bureau's Request for Extension of Time to Provide Expert's Documentation and Motion to Disqualify Expert, filed Nov. 30, 2016. At each turn, the Presiding Judge denied Lake's request. See, e.g., Order, FCC 16M-17 (ALJ, rel. May 5, 2016); see also Order, FCC 17M-06 (ALJ, rel. Feb. 16, 2017).

qualification.² For the reasons set forth below, the Acting Chief, Enforcement Bureau, through his attorneys, opposes Lake's motion.

**Ms. Gremminger Has the Necessary "Knowledge, Skill, Experience,
Training, and Education" to Qualify As an Expert**

2. Rule 702 of the Federal Rules of Evidence allows expert testimony of a witness who is "qualified as an expert by knowledge, skill, experience, training or education," where the expert's specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue."³ If an expert "meets liberal minimum qualifications, then the level of the expert's expertise goes to credibility and weight, not admissibility."⁴ In addition, "[t]here is no requirement that experts share identical backgrounds to be able to opine about the same subject."⁵ Rather, courts have explained that "an expert witness need not have an identical background as another expert witness to rebut the latter's testimony, so long as both witnesses are qualified as experts on the same designated issues."⁶

3. Here, pursuant to Rules 702 and 703 of the Federal Rules of Evidence, the Bureau has offered Ms. Gremminger as someone with specialized knowledge concerning the measures that Missouri law enforcement has adopted in "evaluating the risks that sex offenders pose" to the community and assessing their risk to re-offend.⁷ She graduated from the University of Missouri, with a major in criminal justice and a minor in psychology, and

² See *id.* at 5-8.

³ See Fed. R. Evid. 702.

⁴ *Id.*

⁵ *Pulse Medical Instruments, Inc. v. Drug Impairment Detection Services, LLC*, 858 F.Supp.2d 505, 511 (D. Md. 2012) (citing *Kopf v. Skrym*, 993 F.2d 374, 377 (4th Cir. 1993)). See also 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure*, § 6265 (2011) (stating that the requirement that the area of an expert's competence match the subject matter of his testimony "does not mean that an opinion on a given issue can only be given by an expert in a single specific discipline").

⁶ *Pulse*, 858 F.Supp.2d at 511.

⁷ See *David Titus*, 29 FCC Rcd 14066, 14072-73, ¶¶ 15-16 (2014) (*Titus*).

subsequently attended and graduated from St. Charles County Law Enforcement Academy.⁸ She has worked over 20 years⁹ in local law enforcement at the county and state levels, including at the St. Charles County Sheriff's Department as a Corrections Officer and at the Missouri Department of Corrections as a Parole Officer and Sex Offender Specialist, supervising the probation and parole of sex offenders.¹⁰ In addition, Ms. Gremminger has testified as an expert in at least twenty-five cases in Missouri, in which she has offered her opinion on the risk of re-offense by sexual offenders convicted of similar offenses to those committed by Michael Rice (Rice) Lake's president, director and sole shareholder.¹¹ Moreover, she maintains her skills assessing the risk factors associated with sex offenders by participating in numerous courses conducted by the Missouri Department of Corrections and other law enforcement entities in the greater St. Louis area.¹² This experience should be more than sufficient to qualify her as an expert to assist the Presiding Judge to understand the evidence and to resolve, among other things, a key question relevant to the ultimate assessment of Rice's character qualification, namely whether Rice remains a high risk to re-commit sex offenses in the community.¹³

4. Despite Ms. Gremminger's extensive experience supervising the probation and parole of sex offenders and conducting risk assessments, Lake contends that, she does not meet the qualifications of an expert with such specialized knowledge because "she does not hold any

⁸ See EB Direct Case Exhibit No. 2 (Testimony of Tammy Gremminger) (Gremminger) at ¶ 2.

⁹ Ms. Gremminger's written direct testimony says she has worked in the Probation and Parole Department for more than thirty years. This is a typographical error. She explains that she started in the Probation and Parole Office in 1993, approximately twenty-four years ago. See Gremminger at ¶¶ 1-2.

¹⁰ See *id.* at ¶ 2.

¹¹ See *id.* at ¶ 7; see also Enforcement Bureau's Second Supplemental Status Report, filed Mar. 2, 2017, at 2-3.

¹² See Gremminger at ¶ 5.

¹³ See, e.g., *Smith v Ford Motor Company*, 215 F.3d 713, 718 (7th Cir. 2000) ("Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience... Thus, a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.").

advance academic degrees or professional license from the State of Missouri” and because “she does not claim any supervisory position or experience in the [Department of Corrections’s] organizational ladder.”¹⁴ There is nothing in either Rule 702 or 703 that requires Ms. Gremminger demonstrate either of those things to qualify as an expert.

5. Lake also alleges that Ms. Gremminger is not qualified because, according to Lake, only two of 40 training courses she identified as part of her written direct testimony “appear to have anything to do with re-offending risk assessment.”¹⁵ Lake fails to offer any basis for this allegation – or even identify which of the two course it believes relate to sexual offender risk assessment. While the relevance of these courses to Ms. Gremminger’s expertise may not be evident to Lake simply from the title, to the extent that Lake questions these courses’ applicability to her specialized knowledge as a Sex Offender Specialist with the Missouri Department of Corrections, the more appropriate action would be to question her about them during her *voir dire*, and not to simply exclude her testimony.

6. Lake also makes the outlandish claim that Ms. Gremminger should be disqualified because, although she states in her written direct testimony that she has testified in approximately 25 cases as an expert in the area of risk assessment of sex offenders, she fails to “list the cases” in her written direct testimony so Lake has “no way to substantiate that claim.”¹⁶ However, as Lake is fully aware – at its insistence – the Bureau previously provided Lake with a list of the cases in which Ms. Gremminger has offered her opinion on a sex offender’s risk to reoffend, including the date of the hearing, the court and the name of the judge.¹⁷ Thus, Lake’s objection to Ms. Gremminger on this ground is baseless.

¹⁴ Motion at 1-2.

¹⁵ Motion at 3.

¹⁶ *Id.*

¹⁷ See Enforcement Bureau’s Second Supplemental Status Report, filed Mar. 2, 2017, at 2-3.

**Ms. Gremminger's Written Direct Testimony Is Admissible
Under the Federal Rules of Evidence**

7. Lake further objects to Ms. Gremminger's testimony on the grounds that it is derived from her review of official records maintained in the ordinary course of business by the Probation and Parole Board of the Missouri Department of Corrections for the purpose of supervising and evaluating sex offenders.¹⁸ Lake alleges that these documents are inadmissible hearsay.¹⁹ However, as the Bureau set forth in its response to Lake's objections to the Bureau's direct case exhibits, these documents are admissible under exceptions to the hearsay rule.²⁰

8. Specifically, Rule 803(8) of the Federal Rules of Evidence provides that "reports, statements, or data compilations, in any form, of public offices or agencies, setting forth...the activities of the office or agency"²¹ are not excluded by the hearsay rule. This exception to the hearsay rule "is based upon the principles that public documents prepared in the discharge of official functions are presumed trustworthy, and the necessity of using such documents is due to the likelihood that a public official would have no independent memory of a particular action or entry where his duties require the constant repetition of routine tasks."²² Moreover, "[o]pinions and conclusions, as well as facts, are covered by [this Rule],"²³ and the Supreme Court has adopted a broad interpretation of its applicability.²⁴ The Commission has recognized that this rule applies in Commission proceedings, holding that the records of government agencies are fully admissible as an exception to the hearsay rule, citing Rule 803(8)

¹⁸ See Motion at 4-5.

¹⁹ See *id.*

²⁰ See, e.g., Enforcement Bureau's Response to Lake Broadcasting, Inc. Objections to Direct Case Exhibits and Testimony, filed Apr. 26, 2017, at 4-7.

²¹ See Fed. R. Evid. 803(8).

²² See *United States v. Becerra-Valadez*, 448 Fed. Appx. 457, 461 (5th Cir. 2011).

²³ See *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991).

²⁴ See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169-70 (1988).

of the Federal Rules of Evidence.²⁵

9. The Bureau submits that the Missouri Department of Corrections records in question are “public records” within the meaning of Rule 803(8). The Bureau’s witness, Ms. Gremminger, is a licensed Parole Officer working in the Missouri Department of Corrections and has authenticated these records. Moreover, courts have frequently recognized that probation and parole records fall within the hearsay exception set forth in Rule 803(8).²⁶

10. Because the Missouri Department of Corrections records qualify as “public records” within the meaning of Rule 803(8), they are presumed to be admissible unless the party opposing admission proves the records’ untrustworthiness.²⁷ Lake has not alleged that the records in question are untrustworthy. Thus, Lake’s objection on this ground as well should be rejected.

11. Even if the Presiding Judge were to conclude that the Missouri Department of Corrections records should be excluded, however, Ms. Gremminger’s testimony based on those records is admissible pursuant to Rule 703 of the Federal Rules of Evidence. Pursuant to this Rule, “the facts or data [upon which an expert bases an opinion or inference] need not be admissible in evidence in order for the opinion or inference to be admitted,”²⁸ as long as the facts and/or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”²⁹ Thus, Ms. Gremminger’s opinions and/or

²⁵ See, e.g., *Nancy Naleszkiewicz*, Memorandum Opinion and Order, 10 FCC Rcd 1083, Appendix n.18 (1995) (government records admissible in FCC proceeding under Federal Rule of Evidence 803(8)); see also *Mr. Tylor Stone et al.*, Letter Decision, 30 FCC Rcd 14367, 14374 note 39 (MB 2015) (records of government investigation admissible pursuant to exception to the hearsay rule).

²⁶ See, e.g., *U.S. v. Harris*, 557 F. 3d 938, 942 (8th Cir. 2009) (finding parole records admissible in a criminal proceeding under Federal Rule of Evidence 803, notwithstanding the provision in subsection (B) limiting the use of this exception in certain criminal cases).

²⁷ See *Moss*, 933 F.2d at 1305.

²⁸ Fed. R. Evid. 703.

²⁹ *Id.*

inferences based upon the facts or data contained in the Missouri Department of Corrections records would be admissible as long as these records are the type reasonably relied upon by experts in forming the type of opinion rendered by Ms. Gremminger.³⁰

12. Here, Lake does not contest that the Missouri Department of Corrections documents are the type that are reasonably relied upon by experts in determining whether a sex offender poses a risk to reoffend. Moreover, Ms. Gremminger offers testimony – which Lake does not object to – demonstrating that, in assessing the risk posed by sex offenders, she usually considers the very types of facts and data found in the Missouri Department of Corrections records, such as the sexual offenses that occurred, any justification(s) offered for the offender's actions, the offender's denial or acceptance of responsibility for his/her actions, the official police report, and the offender's participation in sex offender treatment.³¹

13. Thus, pursuant to Rule 703 of the Federal Rules of Evidence, the portions of Ms. Gremminger's testimony that Lake seeks to exclude solely on the basis that they are based on allegedly inadmissible documents, should be admissible.

Lake's Challenges to Ms. Gremminger's Credibility Are Misplaced

14. Although captioned as a motion to disqualify Ms. Gremminger, Lake's motion also seeks to challenge the credibility of Ms. Gremminger. For example, Lake appears to suggest that her entire written direct testimony should be deemed inadmissible because it is not based on her personal observation of Mr. Rice.³² Ms. Gremminger testified at her deposition,

³⁰ See *Wilson By and Through Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1153 (10th Cir. 1990) (allowing an expert to reveal the basis of his testimony during direct examination, even if the basis is hearsay, provided that the facts or data underlying his conclusions are of a type reasonably relied upon by others in his field of expertise). Notably, the cases cited by Lake also stand for this proposition. See *Objections at 2* (citing *U.S. v. Lundy*, 809 F.2d 392, 395 (7th Cir. 1987); *Paddack v. Dave Christensen Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984).

³¹ See Gremminger at ¶ 6.

³² See Motion at 3.

however, that she attended three visits to Rice's home,³³ observed Rice at group sessions while he was on parole,³⁴ and discussed his case with her partner and Rice's parole officer Missy Cruze.³⁵ In any event, even if Ms. Gremminger had not personally observed Rice, it would not form a basis for disqualifying her as an expert.³⁶ Rule 703 of Federal Rules of Evidence specifically allows experts, in reaching their opinion, to rely on facts not personally observed.³⁷ Indeed, Rule 703 permits "an expert's testimony [to] be formulated by the use of the facts, data and conclusions of other experts."³⁸ Here, Ms. Gremminger properly relied on the opinion and testing data provided by Lake's own expert, Dr. Duncan-Hively, in formulating her opinion.³⁹

15. In addition, before *voir dire* has even taken place, Lake outrageously asserts that Mr. Gremminger already "has lost all credibility"⁴⁰ because of her alleged (but unsubstantiated) connection to what Lake refers to as a "Fake News" episode. Lake is apparently referring to the Bureau's motion requesting an extension of certain expert disclosure deadlines because Ms. Gremminger had been instructed by the Department of Corrections not to have further contact with the Bureau and the Bureau needed time to investigate the issue and to secure her continued involvement. Although the Bureau had initially been given the impression that Rice (or someone working at his direction or on his behalf) may have threatened Ms. Gremminger, it

³³ See Transcript of the Deposition of Tammy Gremminger, dated Sep 14, 2016, filed herewith as Attachment A, at 37, line 12 to 39, line 11.

³⁴ See *id.* at 43, line 15 to 44, line 8.

³⁵ See *id.* at 43, lines 4-21.

³⁶ See Motion at 4.

³⁷ See Fed. R. Evid. 703. Specifically, Rule 703 of the Federal Rules of Evidence provides that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." *Id.*

³⁸ See *Asad v. Continental Airlines, Inc.*, 314 F.Supp.2d 726, 740-41 (N.D. Ohio 2004) (expert's reliance on another expert's opinion in expressing his own opinion on causation held proper).

³⁹ See Gremminger at ¶ 15.

⁴⁰ Motion at 8.

quickly informed the Presiding Judge and counsel for Rice that, upon further investigation, it did not appear there had been any such intimidation.⁴¹ At the time, Lake was quick to insinuate – without any evidentiary basis – that Ms. Gremminger manufactured the story, but the Bureau assured the Presiding Judge that there was no evidence that she had had any involvement in generating the rumor about Rice.⁴² Rather, as it turned out, Ms. Gremminger had been instructed to suspend her work for the Bureau until her legal department cleared her continued participation in this hearing matter. In its Motion, Lake still fails to identify any evidence supporting the aspersions they cast against Ms. Gremminger. Nevertheless, even if Lake's allegations were substantiated – which they are not – it would be a factor in assessing the weight to be given to Ms. Gremminger's testimony, and not in assessing her qualifications to testify in the first instance.

Conclusion

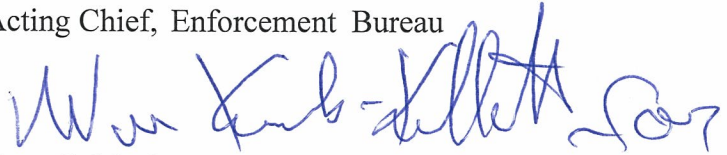
16. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge deny Lake's most recent attempt to disqualify Ms. Gremminger.

⁴¹ Enforcement Bureau Supplemental Status Report, filed February 15, 2017 at 3.

⁴² See Prehearing Conference Transcript (Tr.) dated February 16, 2017, at 125-141.

Respectfully submitted,

Michael Carowitz
Acting Chief, Enforcement Bureau

A handwritten signature in blue ink, appearing to read "Michael Carowitz", with a stylized flourish at the end.

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A handwritten signature in blue ink, appearing to read "Gary Oshinsky", with a stylized flourish at the end.

William Knowles-Kellett
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May 2, 2017

CERTIFICATE OF SERVICE

I, William Knowles-Kellett, counsel for the Enforcement Bureau's Investigations & Hearings Division, certify that I have on this 11th day of May, 2017, caused to be sent via email a copy of the foregoing corrected copy of ENFORCEMENT BUREAU'S OPPOSITION TO LAKE S MOTION IN LIMINE to:

Jerold L. Jacobs, Esq.
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And caused a copy of the foregoing to be served via hand-delivery to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, DC 20554



William Knowles-Kellett